

INFLUENCES ON GOVERNMENT
USE OF THE
POLYGRAPH

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Prepared by:

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I

For several years the polygraph examination process has been the target of criticism and opposition. The sources of criticism and opposition include those who want all polygraphing outlawed as well as those who believe in the process but who want to see it better researched, better controlled, and better handled.

These sources include officers in the federal government in both the executive and legislative branches, in State governments, in private industry, in local governments, in the polygraph professional societies, in labor unions, and in the newspaper business. They cannot be categorized or otherwise labelled. They include responsible people as well as irresponsible. They include people who are interested in effective security and other screening programs just as they probably include those who are not.

It is the purpose of this paper to review what some of these sources have said and, in some cases, what some have done. It is not proposed to view the merits or demerits of their positions, policies, or procedures. To date the Agency polygraph program has been relatively free from such hard influences as federal law or Executive Orders. The level and position, however, of some of the sources to be referred to requires that their positions on the polygraph process be known and listened to and departed from only after serious consideration.

II

For several reasons, the contents of the report written by Dr. Jesse Orlansky are important. This report has had its effect on the Department of Defense program. It is basic to many of the positions of the Committee on Government Operations for which Mr. Moss served as chairman of a subcommittee which looked into the polygraph process and it may be the yardstick against which the congress measures progress in implementing its recommendations and recommendations of others.

Chronologically, the influence of the Orlansky report can be traced as follows:

- 1962 - The report was published and turned over to the Department of Defense.
- 1964-1965 - The report was incorporated into the Moss Subcommittee study of the polygraph after having been declassified (almost in its entirety) at the insistence of the Subcommittee.
- 1965 - The Department of Defense issued its directive on the use of the polygraph.
- 1965 - A Presidential committee was created to study the executive branch use of the polygraph.
- 1967 - Restrictions on the use of the polygraph were contained in S-1035 by the 90th Congress which bill had a larger area of concern than just polygraphy.
- 1968 - The Civil Service Commission included in the Federal Personnel Manual revised instructions on both the investigative and polygraph examination processes.

The Orlansky Report

Dr. Orlansky made the following recommendations:

- a. the establishing of a research program to study:
 - (1) validity of the polygraph program
 - (2) improvement in interview procedures
 - (3) improved sensors
 - (4) new sensors
 - (5) computer analysis of polygraph charts
 - (6) polygraph countermeasures
 - (7) cultural, political, social, and ethnical influences on the process; and
- b. the establishing of a program to develop professional standards designed to improve:
 - (1) selection of examiners
 - (2) training of examiners
 - (3) certification of examiners
 - (4) supervision of examiners
 - (5) maintenance of competence
 - (6) record keeping
 - (7) performance evaluation, and
 - (8) relationship of operation personnel to research and development programs.

The Moss Subcommittee

In its 1965 report, the Subcommittee made the following recommendations:

- a. the initiation of a comprehensive research program;
- b. the prohibition of the use of the polygraph in all but the most serious national security and criminal cases;
- c. improvement of standards for training and qualifying federal examiners;
- d. restrictions on the use of two-way mirrors and recording devices;
- e. guarantees as to the voluntary nature of polygraph examinations;
- f. restrictions on knowledge that a given individual declined to be polygraphed; and
- g. the creation, by the President, of an inter-agency committee to look into the use of the polygraph.

The Department of Defense

In July 1965, the Department issued Directive Number 5210.48. This has had the effect of limiting the use of the polygraph in Defense although it did exempt NSA and other functions having to do with what Defense refers to as cryptologic clearance functions.

There are, however, no exemptions allowed to the following general policy:

"The probing of a person's thoughts or beliefs, and questions about conduct which have no security implications are prohibited.

Examples of subject areas which should not be probed include the following: religious beliefs and affiliations, beliefs and opinions regarding racial matters, political beliefs and affiliations of a non-subversive nature, and opinions regarding the constitutionality of legislative policies."

In addition, the Department prohibits adverse action based on refusal to take a polygraph examination and restricts knowledge of such refusal.

Except for NSA there is no provision for use of the polygraph as a screening device.

The Department set standards or requirements on the following topics:

- a. maintenance of polygraph files and information;
- b. dissemination of polygraph information;
- c. selection of examiners, including qualifications of incumbents;
- d. training; and
- e. supervision of examiners.

The Civil Service Commission

In July 1964, the General Counsel of the Civil Service Commission expressed doubt that the use of the polygraph in the competitive service could be held to be legal. These doubts were based on questions of invasion of privacy and the unreliability of the process which in his words would make decisions based on the polygraph arbitrary and capricious.

In January 1966, it became the official position of the CSC that:

"No such test may be given for this purpose (selection and screening) with respect to positions in the competitive service."

In 1968, however, Federal Personnel Manual Letter No. 736 was issued. This Letter revises CSC policy in order to permit the use of the polygraph in certain organizations. Where the use of the polygraph is otherwise permitted, the Civil Service Commission has established requirements on the following:

- a. topics which cannot be gone into;
- b. the purposes for which the polygraph can be used;
- c. recording and monitoring devices;
- d. protection against self-incrimination and right to counsel;
- e. the effect of the examination and the effect of refusals;
- f. other information to be furnished the subject;
- g. knowledge to the subject of the areas to be covered;
- h. voluntariness of the examination;
- i. the relevance of the test questions;
- j. standards for selection and training of examiners;
- k. monitoring and supervision of examiners; and
- l. safeguarding of polygraph files and their contents.

State and Local Legislation

Some States and lesser political entities have enacted legislation pertaining to the polygraph. Some have included in their legislation an exemption for the federal government; others have not.

Some prohibit polygraph examinations for employment purposes. Others merely require the licensing of polygraph examiners. The American Polygraph Association program is to have all States have licensing programs and not the more restrictive legislation. The model legislation, which is in effect in some States, includes provisions for the following:

- a. determinations as to the competency of the examiner;
- b. complete disclosures to the subject;
- c. insuring voluntariness of the examination;
- d. advising the subject of the outcome.

III

Not all of the papers issued by the bodies referred to in this document contain either the background for certain statements made in reports on findings or in their recommendations nor do they contain specific proposals on how some of their recommendations are to be handled. Most, for example, agree on the need for research but only Dr. Orlansky has set forth a detailed research program. Most mention the need for improved selection standards but the specification of standards and the means for measuring an individual against those standards remain to be worked out.

There are, however, matters on which some specific statements have been made as well as matters in which there is considerable agreement as to the problem and general solution lines.

These matters include the following:

- a. invasion of privacy considerations;
- b. standardization and relevance of coverage;
- c. disclosures to the subject prior to the test;
- d. the voluntary nature of the test;
- e. the handling of polygraph acquired data;
- f. selection, training, and supervision of examiners;
- g. program control and supervision.

Invasion of Privacy

The Justice Department member of the President's committee wrote, in early 1966,

"--No one will doubt that its use constitutes an invasion of privacy; at odds with the accepted standards of conduct and fairness a free society prides itself on."

The OST member, at a meeting of the Staff subcommittee of this committee, stated that a serious question of invasion of privacy occurred when polygraph subjects allowed a review of their physiological responses which they had no intent or willingness to reveal to the examiner.

In 1965 when the Civil Service Commission outlawed certain psychological tests, the Commission wrote that it is the nature of personnel management processes to invade the privacy of the individual. The Commission went on to state that the seeking of any information which is not relevant constitutes an unwarranted invasion of privacy.

While reaffirming the need for society to have means to protect itself, the President's committee report stated that the use of the polygraph constitutes an invasion of privacy.

With the issuance of FPM Letter No. 736, the CSC restates its position that invasion of privacy cannot be avoided but that unwarranted invasion of privacy must be.

Standardization and Relevance of Coverage

In the report of the House Committee on Government Operations the following appears:

"The polygraph technique forces an individual to incriminate himself and confess to past actions which are not pertinent to the current investigation. He must dredge up his past so he can approach the polygraph machine with an untroubled soul. The polygraph operator and his superiors then decide whether to refer derogatory information to other agencies or officials."

The President's committee, the Department of Defense, and the Civil Service Commission have all addressed themselves to this problem. The so-called Ervin Bill (S-1035, 90th Congress) also attempted to correct the situation which gave rise to the quoted statement from the Moss Subcommittee report.

Two approaches are direct: one has to do with the insuring the relevance of the question asked while the other approaches it by requiring the individual to consent to the polygraph only after knowing what questions will be asked and what information is to be sought. The third indirect approach is through the research program whereby interest in a topic is to be validated.

The Civil Service Commission, in FPM Letter 736, has set comparable limitations. The Ervin Bill excluded questions about these topics as well as questions relating to sexual conduct and attitudes.

Disclosures to the Subject Prior to the Test

The President's committee report and the Civil Service Commission FPM Letter 736 contain the same wording on this topic. In both there are requirements for complete disclosures to the subject before he takes the polygraph test.

The subject must be told about any listening or monitoring devices, the effect of the polygraph examination on his application, and the effect of a refusal to take the examination. The entire testing process must be explained, including the machine, the conduct of the test, the procedures to be used, the areas to be covered in the test, and the disposition of information developed during the examination. In addition, he must be specifically advised of his right to counsel and his privilege against self-incrimination.

Voluntary Nature of Polygraph Testing

Both the President's committee report and the Civil Service Commission Federal Personnel Manual contain the requirement that an individual voluntarily consent to the polygraph examination, in writing, after having been informed fully of the matters referred to in the preceding section.

The Moss Subcommittee report contains the following statement:

"As long as notation is made in any official file that an individual refused to take a polygraph test, the examination is in no way voluntary."

The Justice Department member of the Staff Subcommittee of the President's committee wrote:

"Although I have no objection to a requirement that the individual--give his written consent, such a (requirement) seems meaningless absent an affirmative statement that failure to consent will not be harmful to the employee's career, at least in other than national security situations. Written consent under these circumstances is a form of coercion."

The Handling of Polygraph Acquired Data

The various authorities cited have established a requirement for rules for the handling of polygraph acquired data with handling problems encompassing several matters. First, there is the matter of informing the subject precisely what will be done with the data. Second, there is the matter of internal dissemination and internal protection. Third, there is the matter of external dissemination.

The Civil Service Commission states only that polygraph data must be handled in such a way as to avoid unwarranted invasion of privacy.

The Department of Defense has established certain rules but permits easy flow outside the Department to other federal officials and to State law enforcement officials.

Selection, Training, and Supervision of Examiners

The cited authorities call for improvement on the topics of selection, training, and supervision of examiners.

The DOD directive sets selection standards for both applicants and incumbents, training requirements, and supervisory mechanics.